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No. 82-1944

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

STEPHEN A. GONSALVES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent opposes the petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Petitioner's Appendix A) is reported at 691 F.2d 1310. the district court's order granting respondent's motion to dismiss (Petitioner's Appendix B) is unreported. The 1976 oral opinion of the district court granting motions for "acquittal" filed by three other defendants charged along with respondent in the indictment (Petitioner's Appendix C) is unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the district court has the inherent supervisory power to dismiss an indictment which alleges separate and distinct multiple conspiracies as one general conspiracy, the effect of which causes duplicity, lack of jurisdiction and venue, and prejudicial variance.

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals, Ninth Circuit (Petitioner's Appendix A at 1a - 10a).

ARGUMENT

The present decision is in full accord with other decisions adopted in the courts of appeals. Review on certiorari is therefore not warranted

since no conflict among the circuits exists with regard to the question presented.

Whether the district court has the supervisory power to dismiss, upon pre-trial motion, an indictment which alleges multiple conspiracies as one general conspiracy, the effect of which causes duplicity, lack of jurisdiction and venue, and prejudicial variance is a question answered in the affirmative by the courts on numerous occasions. Under facts such as those presented (Petitioner's Appenxix A, at 1a - 10a), the Ninth Circuit has unequivocally upheld the district court's invocation of its supervisory powers to dismiss cases when there is a clear basis in fact and law for doing so, or more broadly, where the assertion of supervisory power is necessary to preserve the integrity of the judicial process and to avoid fundamental unfairness. United States v. Chanen (9th Cir. 1977) 549 F.2d 1306; United States v. Wilson

(9th Cir. 1980) 614 F.2d 1224.

The overwhelming weight of evidence before the district court supported the invocation of its inherent supervisory powers, and it was therefore proper to dismiss the indictment which impermissibly alleged separate and distinct multiple conspiracies as one general conspiracy. This was particularly true where the dismissal remedied defects of duplicity, lack of jurisdiction and venue, and prejudicial variance.

To support respondent's position that multiple conspiracies were alleged as one general conspiracy resort must be made to the indictment, the Government's massive trial memorandum, the Government's opening statement and the detailed statements of the three prosecution key witnesses, James Earl Garter, Gary Lynn Lickert and Harold Adrian Armstrong. The effect of the information in this combination of evidence is the revelation of at least seven separate and

distinct conspiracies. These separate and distinct conspiracies contain overlapping groups of players at different times in different places allegedly effectuating the importation of controlled substances in a finite number of unique unrelated transactions.

Each importation characterized consisted of its own independent character unrelated in any material manner or element to the prior or following importation, even to the extent that all of the featured players in each importation disbanded at the conclusion of each episode. Therefore based upon the evidence before the court the present case fell within the parameters of applicable appellate decisions wherein multiple conspiracies were found. (See e.g. Kotteakos v. United States (1946) 328 U.S. 750; United States v. Durades (9th Cir. 1979) 607 F.2d 818; United States v. Butler (10th Cir. 1974) 494 F.2d 1246, 1254-1257; United States v. Bertolotti (2nd Cir.

1975) 529 F.2d 149, 154-159; United States v. Varelli (7th Cir. 1969) 407 F.2d 735; United States v. Arteaga-Limones (5th Cir. 1976) 529 F.2d 1183, 1194).

The district court's ruling, based upon the evidence before it, was consistent with the instructions provided under Rules 12 and 18 of the Federal Rules of Criminal Procedure. Rule 18 provides, except as otherwise permitted by statute or the Federal Rules of Criminal Procedure, the prosecution of a case shall be had in the district in which the offense was committed. Clearly the record establishes this rule was not followed with regard to Respondent since the Government in fact concedes in Appellant's Opening Brief, at pages 24-25 thereof:

> "If there were multiple conspiracies, Nevada would not have venue because most occurred in California and elsewhere. Furthermore,

> the Government concedes that it has no direct evidence of defendant GONSALVES participating in activities in the District of Nevada which would subject him to the venue of the Federal Courts in Nevada."

Since the record clearly establishes that the only events which occurred in Nevada were totally unrelated to any activity by Respondent, the district court's ruling was a proper exercise of its inherent supervisory powers and was consistent with the principles established by Rule 18.

Asserting defects of duplicity, lack of jurisdiction and venue and prejudicial variance, Respondent properly raised these defects by pretrial motion under Rule 12. In fact, as is evident in the decisions of United States v. Price (2nd Cir. 1971) 447 F.2d 23, 27, 28; and United States v. Boney (1978) 572 F.2d 397, 400, had Respondent

not raised these defects by pre-trial motion, the risk of waiver would have plainly presented itself. As such, Respondent was given little choice but to raise the issues of commingling of multiple separate and distinct conspiracies, lack of jurisdiction and venue and prejudicial variance. Dismissal was therefore appropriate, absent a finding of one massive general conspiracy.

Finally, dismissal was appropriate based upon the United States Attorney's recalcitrance in changing the indictment to a size consistent with the district court's suggestions following the initial dismissal without prejudice. This position was emphasized by the opinion of the Court of Appeals (Petitioner's Exhibit A, at 20a) wherein the court stated:

> "Although the court's order is not entirely explicit, it is clear that the indictment was dismissed without prejudice. The order suggested that

> the indictment be broken down into smaller, more manageable indictments, thus leaving the prosecutor free to reindict Gonsalves, and the other alleged conspirators, in a manner less intrusive upon the administration of a fair criminal justice system in the courts."

The Court of Appeals further emphasized in its concluding remarks (Petitioner's Exhibit A, at 23a) that the exercise here by the district court of its inherent supervisory powers did not constitute an improper substitution of judicial discretion for prosecutorial discretion:

> "Such dismissals may easily constitute an example of improper substitution of judicial discretion for prosecutorial discretion. It remains the perogative and responsibility of the executive to determine whether

to prosecute at all. In conrast, the district judge in this case left the government free to reindict the defendant, either in the same district pursuant to a more manageable indictment, or in another district, should a new indictment reveal a lack of jurisdiction over this particular defendant." (Emphasis added)

Accordingly, the United States Attorney was given the opportunity to refocus this attempt to force as many defendants as possible to trial in the same proceeding on the unfounded claim of a single conspiracy. The failure to alter this cumbersome indictment left the district court with one choice - the proper exercise of its inherent supervisory powers to dismiss the indictment.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

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